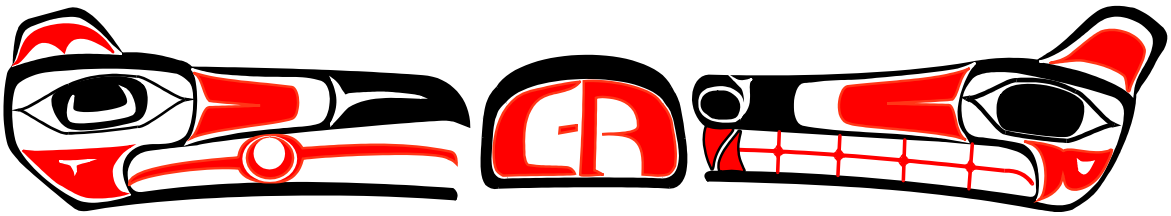

CHAMPAGNE and AISHIHIK First Nations

BY FAX (613-947-4065) AND E-MAIL: richard.neufeld@sen.parl.gc.ca

October 3, 2014

Senator Richard Neufeld
Senate Committee on Energy, the Environment and Natural Resources
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Senator Neufeld,

Re: Proposed Amendments to the *Yukon Environmental and Socio-economic Assessment Act* (Canada)[YESAA] through Bill S-6: An Act to amend the Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Nunavut Surface Rights Tribunal Act

This letter is provided as a follow up to our presentation to the *Standing Senate Committee on Energy, the Environment and Natural Resources*, September 25th, 2014. I would like to thank you for providing representatives of Champagne and Aishihik First Nations (CAFN) the opportunity to briefly present as part of the Council of Yukon First Nations allotment of time. This letter is intended to reaffirm and provide further explanation of our concerns with certain proposed amendments to the YESAA under Bill S-6. I trust you will give full and fair consideration to CAFN's comments and issues before concluding the Committee's report back to the Senate.

Introduction

Our comprehensive land claim agreement entrenched a relationship between Canada, the Yukon and CAFN. In consideration for the extinguishment of certain rights, titles and interests to significant portions of our territory, we agreed to the bundle of rights, titles and interests set out in our agreement. A significant consideration was the surrendering of Aboriginal title to more than 90% of our land in exchange that CAFN would be guaranteed a meaningful role in the management and decision-making throughout our territories. A critical piece of this

bargain was the Development Assessment provisions of Chapter 12, which was, and is, the foundation for the *Yukon Environmental and Socio-economic Assessment Act*. Certain proposed amendments set out in Bill S-6 have the potential to significantly undermine that role of CAFN in the management and decision-making in our territory and, in our view, makes these amendments, at a minimum, inconsistent with the spirit and intent our Treaty.

Bill S-6 is comprised of two distinct types of proposed amendments; those that flow from comprehensive tripartite discussions through the Five-Year Review, as mandated under 12.19.3 of the CAFN Final Agreement, and those that arose more recently and unilaterally by Canada which flow from Canada's larger ambitious legislative agenda that purports to improve the northern regulatory regime. Canada cannot, unilaterally, make substantive changes to YESAA that are outside the scope of the amendments contemplated during the Five-Year Review process without substantively consulting with Yukon First Nations about those amendments. In our view, Canada took a clear step backward with its propositions and its effort to engage meaningfully when these later amendments were introduced. For these provisions, Canada failed in meeting the test of its treaty-based and common law duty to consult and accommodate.

Witnesses before your committee have suggested there were thousands of hours of consultation with Yukon First Nations on these specific amendments. CAFN actively and diligently participated in all aspects of Canada's engagement with respect to the Act. There was a distinctively different effort put forward with respect to the amendments that arose as a result of the Five Year Review versus the process that occurred for certain amendments that were put forward unilaterally by federal representatives, separate and apart from the Five Year Review process.

We consistently requested an equitable working group process to jointly consider and draft proposed amendments to Bill S-6, similar to what took place during the 5 Year Review, in order that the approach would be consistent with the spirit and intent of our Treaty. In response, we were promised by Deputy Minister Michael Wernick's, by letter (Feb. 21, 2013), and later by Minister Valcourt in his letter addressed to Grand Chief Ruth Massie (Sept. 23, 2013). They both stated they would support a working group with our First Nations to focus on legislative and regulatory changes. Such a working group was never established.

It is important that greater scrutiny be applied in the evidence regarding the level of, depth of, and substance of engagement with First Nations on the specific proposed amendments, which were introduced late in the process. Different types of engagement took place; most, if not all, could be characterized as simple notification with little to no willingness by Government to discuss and negotiate possible alternatives. The environment that was set up for these engagement sessions discouraged, and in some cases prohibited, constructive dialogue.

We have consistently sought meaningful engagement to negotiate these matters but Canada has yet to demonstrate it will give full and fair consideration of the views of Yukon First Nations. We continue to be stonewalled with clear signals that these amendments are not up for negotiation. This approach is completely contrary to the law on what consultation actually requires. Nonetheless, we have offered practical solutions to these concepts that do not necessitate legislative action but could be addressed by other means, and in some cases, point back to the better thought out solutions already agreed to under the Five Year Review. To date, we have been incredibly frustrated that our reasonable requests and observations have been treated with little, to no, regard.

The unilateral amendments proposed by Canada are intended to bring certainty and consistency to the northern regulatory regimes in order to promote northern economic development. However, we are sceptical that these ambitions will be achieved. In fact, we would suggest that these amendments may have the opposite effect. If these amendments proceed as presented in Bill S-6, certain First Nations have expressed a desire to seek judicial review. This will create uncertainty in the public and investment community due to the greater political instability and higher risk of litigation.

We are equally interested, if not more so, in ensuring the Yukon is a predictable and low risk jurisdiction to pursue economic and community development. We are vested within and form a major part of the Yukon economy. We feel we have a collective interest with all of the Yukon in this regard, including the objective of an effective and efficient assessment regime. The claim that our assessment regime requires these changes because of the uncertainty it creates to investors is not supported by our First Nations.

The Government has been insisting these changes are required across the nation in order to harmonize with other regimes. This nationally dictated mandate is in sharp contrast to the made-in-Yukon approach YESAA emerged from. This interest cannot supersede the original intention of a distinct environmental assessment regime that is based on our Treaties. In particular, the development assessment process that was developed was intended to be independent and act at arm's length from Yukon First Nations and the Federal and Territorial Government. The assessment process was designed in a way to reflect the regional and cultural distinctiveness. In no way do the aspirations to harmonize regimes across the north and more broadly across Canada reflect the spirit and intent of our treaty.

The matter of YESAA reflecting the interests of all the Parties to the Final Agreements was well understood by the majority of Parliamentarians when Bill C-2 was introduced. The Member of Parliament (Yukon) who introduced the Bill noted that without Bill C-2, there could be as many as 16 different environmental assessment regimes in the Yukon; one for each of the 14 First Nations, one for Canada and one for Yukon. A lot of dedication and effort was put into negotiating the original legislation and its subsequent required Five Year Review.

Binding Policy Direction to the Board

Proposed Amendment #34 to add a new Section 121.1 after Section 121 of YESAA

We are opposed to any amendment that provides authority for the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) to unilaterally issue binding policy directions to the Yukon Environmental and Socioeconomic Assessment Board (*hereafter referred to as; the "Board"*) with respect to any of the Board's powers, duties or functions. The assessment process must not only be neutral, but it must also appear to be neutral. Under this proposed amendment, there is no requirement for the AANDC Minister to obtain the consent of First Nations before issuing policy direction to the Board, only mere notification.

Providing the AANDC Minister with authority to unilaterally issue policy direction undermines the independence of the Board and Designated Offices when conducting assessments. Neutrality is fundamental to the effectiveness of the YESAA and has been discussed at length by the Council of Yukon First Nations (CYFN), Canada and Yukon during the development of the YESAA. Providing a single party with authority to direct the Board is contrary to the spirit and intent of the YESAA and the Final Agreements.

During the Five Year Review, the concept of one Party having the powers to give binding policy direction was never raised. In fact, during the Five Year Review; Canada, Yukon, Yukon First Nations and YESAB discussed a range of matters which were policy-based improvements for how the Board carries out its administrative and procedural duties. This resulted in a large number of recommendations that the Parties agreed to which the Board has already begun carrying out to improve its procedures and practices. Furthermore, YESAB has undertaken the development of proponent guidance documents, including sector specific guidance documents and forms, and reviews and revisions to its by-laws pursuant to sections 35 and 36 of YESAA in order to address matters such as having consistency among its Designated Offices. Some witnesses have testified to the Senate Committee they believe a legislative change is not necessarily a solution to address matters related to YESAB policy and procedures, (for example; consistency among Designated Offices), as they recognize the YESAB already has by-law making authority.

Our treaty expressly states that the Board and its Designated Offices may develop its own procedures and rules. It is important the Board continues to maintain its arms-length and independent ability to function, Even if we did agree the concept of needing to provide binding policy direction had merit, we still assert that it is inappropriate that one Party to our treaties would have greater authority to administer policy direction to the Board.

The concept of binding policy direction was considered by the Federal Government for Boards that had decision-making authority. YESAB's mandate is to provide the Parties

recommendations, which is fundamentally different than the mandates of other Boards such as the NWT Regional Land and Water Boards.

Delegation of Federal Powers

Proposed Amendment #2 to Section 6 of YESAA,

This proposal is another amendment that does not come from the Five year review. It was not until the later stages of the engagement process that Canada identified this concept within the amendments.

We do not support any amendment that would allow the AANDC Minister to delegate any or all of his or her powers, duties and functions under the YESAA to the territorial Minister. Along with the CYFN, we have several concerns relating to this proposed amendment. There is no requirement for the AANDC Minister to obtain the consent of Yukon First Nations before delegating any powers, duties or functions. The AANDC Minister only has to provide notice to the Yukon First Nations.

Canada is proposing a fundamental change in any future discussions about distribution of powers – creating a bilateral federal-territorial process that would be inconsistent with the intent of the Final Agreements. This provision would exclude Yukon First Nations from full engagement and decisions about future re-distributions of powers, duties and functions under the YESAA, even though the decisions may affect First Nation rights and land held by, and decision-making authorities of, First Nations. This is inconsistent with the convention and practices that resulted in the creation of the Act as well as what has been agreed to in other processes like the Devolution Transfer Agreement.

The importance of preserving the balance of power in order to achieve the purposes of Chapter 12 of the Yukon First Nations Final Agreements was commented on by the Supreme Court of Canada in: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103, (the "LSC Case) by LeBel and Deschamps JJ. in reasons delivered by Deschamps J. at para. 179. He said:

> *One objective of Chapter 12 of the final agreements concluded with the Yukon First Nations is to ensure the implementation of a development assessment process that "*provides for guaranteed participation by Yukon Indian People and utilizes the knowledge and experience of Yukon Indian People in the development assessment process" (s. 12.1.1.2*). This framework was designed to incorporate both the participation of the First Nations and a certain degree, if not of decentralization, at least of administrative deconcentration. <u>These objectives are achieved through the membership of the bodies established in Chapter 12 of the final agreements and the</u>*

YESAA, and through the oversight by those bodies of development activities planned for the territory in question. (emphasis added)

The information provided by Canada does not give any rationale for creating delegation authority that is limited to Yukon Government. Final and Self-Government Agreements in the Yukon provide substantial powers to First Nations, but delegation of the federal Minister's YESAA authority to these governments is not contemplated in the proposed amendment. The addition of 6.1(1) to allow delegation by the federal minister could have significant impacts on First Nations. For instance, if the federal minister were to delegate his/her ability to appoint board members to Yukon Government, the Yukon would effectively be appointing 2 out of 3 executive committee members on the board. This is only one example of a potential shift in power that could result from the proposed delegation provisions.

Maximum Timelines for Assessments

Proposed Amendments:
#16 to Section 56(1);
#17 to Section 58(1); and
#23(2) as an added clause after Section 74(2), of YESAA.

The proposals to establish maximum timelines was introduced late in the engagement process in 2013 and did not arise from the Five year review. During the engagement meeting during November 2013, officials had assured our First Nation that the timelines would not include the adequacy review stage. Some witnesses to the Senate Committee have commented on the need to include the adequacy stage in the maximum timelines. It is not realistic to attribute problems with assessments taking a long time solely due to how the Executive Committee or Designated Offices carry out this stage. We point out there is a great deal of responsibility that should fall on the proponent for submitting thorough and complete project proposals. Many projects have long timelines through YESAB because proponents do not submit complete information, requiring the assessors to carry out several adequacy reviews.

YESAB has developed rules for timelines that, for the most part, work very well for projects and the designated offices have worked very hard to achieve these timelines. In most instances, YESAB performs better than the proposed maximum timelines. Assessors require means to work with the decision bodies and proponents on addressing timelines at the Executive Committee and Panel Review stages. Requiring Ministerial approval or an Order-in-Council for extensions adds an unwieldy and unnecessary step for proponents. No reasonable explanation, other than the federal action plan agenda to harmonize across the country, has been given.

Imposing 15 month timelines for screenings by the Executive Committee and 18 month timelines for Panel Reviews do not provide sufficient time to ensure an adequate assessment is

carried out, especially in order to meet the requirements of thorough and meaningful participation by affected First Nations to ensure the required input is brought into the assessment of projects – a process that the Federal and Territorial Government often rely on to fulfill most of its duties for consultation.

Furthermore, the provisions for granting timeline extensions will be unwieldy and will also be subject to political interference, real or perceived.

Note, there has never been a Panel Review conducted under YESAA and the Parties do not have a reasonable understanding on what would be an appropriate timeline for a Panel Review in the Yukon. The Objectives of Chapter 12 will guide a Panel when it establishes its terms of reference. Furthermore, the timelines proposed are not consistent with other jurisdictions, including the allowance for 24 months with possible extensions as established under the Canadian Environmental Assessment Act (2012).

Exemptions for Renewal and Amendments for No Significant Change

Proposed amendment #14 to add Section 49.1(1 and 2) after Section 49 of YESAA

The issue of project renewals and amendments was discussed during the Five year review but the parties had considered the problem was mainly due to smaller, shorter term projects (such as projects triggered by air emissions permits, landfill permits) and had not contemplated all types of projects. The concept of a blanket provision that would exempt all project renewals and amendment from requiring assessment was never discussed during the Five year review and only brought in during the later stage of the engagement in 2013.

The exemption to assess existing projects is far too broad and sweeping in its application. This will prevent a wide range of assessments and fails to acknowledge the impact the cumulative effects. Better alternative solutions have been discussed and agreed to by the Parties during the Five year review (i.e. Recommendation 15(b)).

The concept of only considering whether the project has changed significantly ignores the fact that social, economic, and environmental conditions and /or societal values in which those projects occur may also change significantly over time. This should also be a central tenet in considering when assessments are required for project renewals. This proposed change to YESAA would allow projects that do not change significantly (such as a hydroelectric dam) to go through relicensing without assessment, even though a wide range of conditions may significantly change over time, including: climate change effects, evolution in scientific and technology or traditional knowledge of possible impacts and available mitigation tools, understanding of or changes to environmental conditions, cumulative effects, and changes to societal values. All of these contribute to defining the magnitude and significance effects of a project, even when a project may not change significantly over time. It is therefore important

that longer term projects are reassessed periodically, even if the project remains the same. The proposed provision does not address this substantial issue and will operationally conflict with the amendments related to cumulative effects.

The proposed amendment also ignores the fact that it will be incredibly problematic for assessors to determine the scope of the project to assess, as the temporal scope will be indeterminate. This would force assessors to determine impacts and significance to extremely long and ungainly. It will also present significant challenges to proponents in preparation of their project submissions. This creates an unrealistic challenge for the assessors, as they will have to deal with significant uncertainty which may lead to the determination that impacts are unknown (resulting in Designated Offices passing on assessments to the Executive Committee) or the determination that the project will have affects that cannot be mitigated, resulting in a greater number of recommendations of projects not proceeding or further delays on the completion of project assessments. This would certainly not be a desirable outcome for anyone.

During the Five-year Review, the parties established a technical working group to discuss this scoping issue in detail. They provided a recommendation that was accepted by the parties who agreed that it is not reasonable to create specific constraints related to temporal scoping and terms of authorizations. Neither the working group nor the parties were able to identify any solution that would be appropriate for all types of projects. Instead, the parties recognized that the existing YESAA wording provides flexibility for assessors to establish temporal scopes that are appropriate for each project, and proposed that the issue should be addressed through revisions to assessors' policies and approaches for project scoping. As stated in the Draft Interim Review Report (from recommendation 15(b), p.24):

> *"For some projects, temporal scopes that are consistent with regulatory authorizations may be appropriate (e.g. for projects with environmental and socio-economic effects that are difficult to predict, or projects with changing adjacent land use conditions). In other cases, it may be appropriate to consider project scopes that exceed the duration of specific authorizations (e.g. activities and projects that require a series of short duration authorizations, activities and projects with well understood effects that are unlikely to change). YESAB scoping guidance, practices and policies should provide flexibility for assessors and identify appropriate conditions for applying different approaches to the temporal scoping of projects." (Draft Review Report – Interim. 2012)*

The parties agreed on the actions that should be taken to address the issue:

> *"Future discussions should include a joint examination of YESAB's policies and/or practices on temporal scoping with a specific goal of developing a policy or practice*

that allows an assessor to apply appropriate temporal scopes to projects regardless of the length of the associated authorization." (Draft Review Report – Interim. 2012)

With the proposed amendment, Yukon Government and Canada are now backtracking on the agreement reached in the Five-year Review. The proposed amendment as it currently reads in Bill S-6 would eliminate the existing flexibility that the parties agreed was appropriate.

If for any reason, it was actually agreed to by all the Parties, to ensure there were prescriptive requirements defined under the regulations or legislation, it would be far more appropriate that this issue be addressed under amendments to the Assessable Activities Regulations of YESAA. The current regulations have language that identifies project triggers for project 'modifications ', 'operation', 'abandonment', and 'decommissioning'. Such language could be modified for certain projects to address the issue of short-term projects. There are examples in other jurisdictions whereby regulatory tools are used, instead of legislation, for defining what particular conditions must be met to have exemptions of environmental assessment during regulatory renewals. This would allow for greater flexibility and would provide an easier means to make amendments over time.

Finally, providing the Decision Body to determine whether a project has changed significantly will only arouse controversy and be subject to challenges. We envision such discretion will not create a level playing field in the Yukon. It will be further complicated when more than one Decision Body is to determine if a project should be subject to assessment. The proposed clause 49.2 does not provide enough detail on how disputes would be resolved, even when consultation arises. What will the standard be if agreement cannot be reached?

Follow-up matters from our presentation to the Senate Committee

During our presentation to the Senate Committee, there were a number of discussions that highlighted a number of issues that CAFN would like to provide follow up information to help clarify a few points.

First Nation Representation through the Board: Several witnesses and Senators have referred to the idea that First Nations have guaranteed representation through the YESAA process as we have representation of citizens on the Board, who might provide some assurance that those proposed amendments should not be of too great of a concern. The YESA Board is a public body. Parties make nominations to the board, but those nominees lose their "representativeness" once they sit on the board. Furthermore, the Environmental Assessment, Chapter 12 and the YESAA encompasses the whole range of assessment process, from the proposals through to the decision making stage. Assessment by the board is only one aspect of this assessment process.

Relying on Section 4 of the YESAA on matters related to consistency with the Treaties: In several instances during the Senate Committee hearings, certain witnesses and Senators have noted that Section 4 of the YESAA protects against infringing of our Treaty Rights. The provision reads:

> *"In the event of an inconsistency or conflict between a final agreement and this Act, the agreement prevails to the extent of the inconsistency or conflict."*

We stress that it is essential that Government take whatever steps necessary to ensure the amendments are consistent and not rely on this general provision. When we raised concerns early on, it is not enough to default to this provision. The only way in which we see inconsistencies being confirmed would be through court action. This is certainly not a desirable approach to addressing these matters.

Engagement with the Senate Committee

Although we did appreciate being able to appear before your Committee, we found it troubling that we had to put in great effort to seek an invitation to make an appearance. CAFN is a legally recognized government, yet there was no accommodation to allow us to present separately from the Council of Yukon First Nations. YESAA is an Act that arose from Chapter 12 of our Land Claim Agreement, and we have a material interest in ensuring that it is implemented properly. The Council of Yukon First Nations, although a body recognized with some delegated authority for implementation of certain aspects of the Umbrella Final Agreement (such as coordination of Board nominations and the Designated Representative of the YESAA Five Year Review), it does not have Treaty Rights and interests which are at issue with these amendments.

We are also concerned that other Yukon First Nations were not afforded the opportunity to speak to your committee in person, yet stakeholder groups such as the Canadian Association of Petroleum Producers, Alexco Resources Ltd., Yukon Energy Corporation, the Klondike Placer Mining Association, and the Yukon Chamber of Mines, were granted in-person time with your Committee. We simply see this as a failure to adequately weigh the importance of our Treaty-based interests in these amendments. It has left a strong sense in our community that we are viewed as a minor stakeholder rather than a key partner in co-governance and nation building.

Conclusion

To summarize, we are not opposed to those amendments which clearly arose through substantial discussion, negotiation and compromise through the Five Year Review. Although we did not get the specific language we would have preferred to see in some of those amendments that flowed from the Five Year Review, we recognize that we are partners in this process and compromise and reasonableness is sometimes necessary as part of our long term

reconciliation, relationship and nation building. However, we are deeply concerned, and as stated throughout this letter, fully opposed to the inclusion of certain amendments that will be problematic, and which did not come from engagement that meets the Treaty and common law test of consultation.

Thank you for taking the time to allow us to speak in person with you and for considering our concerns through this written submission.

Sincerely,

Chief James Allen

CC **(by e-mail):**

Yukon First Nation Chiefs
Grand Chief Ruth Massie, Council of Yukon First Nations
Members of the Standing Senate Committee on Energy, the Environment and Natural Resources
Senator Daniel Lang
Ryan Leef, MP-Yukon

Lynn Gordon, Clerk of the Standing Senate Committee (also by Fax: (613) 947-2104)